United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7437

In The

United States Court of Appeals

For The Second Circuit

SHIRLEY HERRIOT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

vs.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated; HENRY FLAGG, individually and as President of Flagg Brothers, Inc.; THE AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.; WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC.; THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK; and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

ANSWERING BRIEF FOR DEFENDANTS-APPELLEES, FLAGG BROTHERS, INC. AND HENRY FLAGG

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6

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES

Statutes Cited Page

Other Authorities Page

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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SHIRLEY HERRIOT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

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-against-

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Defendants-Appellees.

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QUESTIONS PRESENTED FOR REVIEW

1. Is the "state action" requisite under the Fourteenth Amendment Due Process clause and under 42 U.S.C. §1983 prohibiting deprivation of a federally protected right while acting "under color of" state law present in the imposition of a lien by a warehouseman and in the enforcement of a lien by a warehouseman as provided under New York Uniform Commercial Code, §§7-209 and 210.

The court below found in the negative.

2. Does U.C.C. §7-210 comport with the requirements of Due Process under the Fourteenth Amendment.

The court below did not make a finding.

3. Are the plaintiffs proper class representatives of all warehouse depositors in the State of New York.

The court below did not make a finding.

4. Is the defendant warehouseman a proper class representative of all warehousemen in the State of New York.

The court below did not make a finding.

PRELIMINARY STATEMENT

This action is brought under the Civil Rights statute, 42 U.S.C. §1983, creating a Federal cause of action for deprivation of Federal constitutional rights by actions taken under color of state law, and its jurisdictional counterpart, 28 U.S.C. §1343, subd. (3), conferring jurisdiction upon the Federal courts to entertain actions brought pursuant to 42 U.S.C. §1983, without regard to the amount in controversy. Plaintiff BROOKS commenced the action by verified complaint. (A. 5-25)*. Plaintiff JONES intervened in the action by Order of (then) District Judge Gurfein on June 25, 1974. (A. 91-108). Both plaintiffs purport to sue on behalf of a class of warehouse depositors

*The references to the Appendix are denominated A.

in New York State. Plaintiffs contend that §7-210 of the New York Uniform Commercial Code (McKinney 1974) works a deprivation of their constitutional due process rights, under color of state law, in entitling a warehouseman to sell deposited goods to satisfy his lien for storage charges, without requiring a presale hearing on the underlying debt. Plaintiffs seek declaratory and injunctive relief for themselves and the class as well as damages, both compensatory and punitive, for themselves (A. 75-82).

Defendants FLAGG BROTHERS, INC. and HENRY FLAGG filed an answer (A. 26-29) alleging failure to state a claim, lack of subject matter jurisdiction and lack of necessary "state action." In opposition to a motion by plaintiffs for summary judgment, defendants cross moved for dismissal of the complaint. On July 7, 1975 the Hon. Henry F. Werker, United States District Judge, denied plaintiffs' motion and granted the cross-motion, dismissing the Brooks and Jones complaints for lack of jurisdiction.

The Court held that the named individual defendants and the purported defendant class do not engage in warehousemen's lien sales "under color of" state law within the meaning of 42 U.S.C. §1983. In its opinion the Court searched the relevant caselaw, including this Court's recent pronouncements in Jackson v. Statler Foundation, 496 F.2d 623, request for reconsideration denied, id. at 636 (1973), and found legal support lacking for plaintiffs' arguments that the State of New York is actively involved in the execution by sale of defendants' warehouseman's lien. (A. 207-223).

PROCEEDINGS BELOW

Defendants concur with the review of the Proceedings Below in plaintiffs' brief.

STATEMENT OF FACTS*

AS TO PLAINTIFF BROOKS

Plaintiff BROOKS is a resident of White Plains in Westchester County, where she resides with three children. At the time the action was commenced she was employed, netting $100.00 per week. During the period in question she lived in Mount Vernon and all the events in controversy took place there.

Defendant FLAGG BROTHERS is a corporation engaged in the moving and storage business with its principal office in the City of Mount Vernon, Westchester County, New York. (A. 176) Defendant HENRY FLAGG is president of the corporation.

On June 13, 1974 defendant FLAGG was requested by James A. Levister, City Marshal of the City of Mount Vernon, to accompany him to 33 North Third Avenue, Mount Vernon, New York for the purpose of making arrangements to remove the

*Although plaintiffs claim at pg. 5 of the Brief that this Court must accept their allegations as true on appeal, the court below did not rule on the merits of due process or class action issues. Plaintiffs' allegations pertaining to those issues, therefore, need not be accepted as true. Cf. Escalera v. New York City Housing Authority 425 F. 2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970).

belongings of plaintiff SHIRLEY BROOKS from her apartment in the said building to the sidewalk in front of said building. The plaintiff BROOKS was being evicted from her apartment pursuant to a court order. Defendant's initial objective in visiting the apartment at that time was to determine the manpower needs for and the time of the actual removal of plaintiff's goods from the apartment to the sidewalk. In so doing, the defendant was acting solely on behalf of the landlord through the City Marshal. (A. 176).

Upon realization that her possessions, if nothing further were to be done, would be left on the sidewalk, the plaintiff BROOKS asked defendant FLAGG if he could arrange removal of her furnishings to a warehouse for the purpose of storage. Plaintiff was advised that defendant FLAGG BROTHERS, INC. maintained storage space and could accommodate the plaintiff at defendants' rates in both the transportation and storage. Plaintiff BROOKS was further advised that she would have to pay the transportation charges together with accessorial charges for the removal from the sidewalk to the warehouse and in addition pay the storage charges. (A. 177).

At plaintiff's request defendant gave an oral estimate indicating $200.00 charge solely for the transportation phase of the job based upon a six-hour moving job including loading and unloading based on a rate of $28.00 per hour for a van and three men and upon an estimate of a number of barrels and cartons to be used on the job. (A. 177). Plaintiff was further advised that her furnishings would

be loaded into three containers for storage purposes; that the storage rates were $25.00 per month per container and consequently the entire monthly charge would be $75.00 per month; that on July 1, 1973 an additional $75.00 would be due for the period up until July 31, 1973. Plaintiff then authorized defendants to store her goods (A.9,125), agreeing to the above arrangement. At plaintiff's direction her furnishings were moved to storage on June 13, 1973. She paid $178.00 at that time on account of the transportation charges. (A.177).

A few days thereafter plaintiff came to defendants' office where she was given a Bill of Lading. The Bill of Lading listed each of the charges which were incurred in the removal. (A.16). The Bill of Lading specifically set forth storage charges of $75.00 per month. In addition, plaintiff was given a Household Goods Descriptive Inventory List, which described the nature of her belongings placed in storage.

On August 22, 1973, defendant sent plaintiff a note requesting payment together with a so-called "Final Notice".* (A.178). Defendants did not attempt to enforce their lien as provided in §7-210. Instead, pursuant to

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* This document was not the detailed notice required by the statute prior to sale. N. Y. Uniform Commercial Code §7-210, subd. (2) at para. (c).

an agreement between the attorneys, the plaintiff removed her goods from the warehouse on January 24, 1974 without payment of any charges for storage. (A.179). In point of fact, the only amount the plaintiff paid was $178.00 as an advance against the transportation service incurred back on June 13, 1973 at the time of the removal of her belongings to the warehouse. (A.179).

AS TO PLAINTIFF JONES

On November 26, 1973 defendant FLAGG accompanied the City Marshal to 353 Mundy Lane, Mount Vernon, New York, to the apartment of the plaintiff GLORIA JONES who was being evicted pursuant to court order on that day. Again the purpose of the visit was to determine the manpower needs for and the time of the actual removal of plaintiff's goods from the apartment to the sidewalk. Also, again in so doing defendant was acting solely on behalf of the landlord through the City Marshal. (A.179).

Plaintiff JONES called the Department of Social Services for the purpose of obtaining funds to pay the overdue rent and thereby satisfy the judgment. Plaintiff advised defendant that the request was refused, but that the Department would pay for the transportation of her belongings to defendants' warehouse and for one month's storage payment. This was confirmed. (A.180). Defendant advised Mrs. Jones that her belongings would be stored

in three (3) crates at a storage rate of $25.00 per crate per month and further that after the Department ceased storage payment, it would be her obligation. She stated that her belongings would not be in storage more than a month because she had another apartment ready for her occupancy. (A.180). Defendants loaded plaintiff's belongings into its truck for transportation to storage in the presence and with the approval of plaintiff. (A.180).

A Bill of Lading was issued on November 26, 1973 together with a Household Goods Inventory List describing the property of Mrs. Jones taken into storage. The storage charges are likewise specified on the Bill of Lading.

By letter dated January 31, 1974, the Department of Social Services advised plaintiff that it would not pay further for her storage. (A.180).

Plaintiff did not contact defendants from November 26, 1973, the date storage commenced, until March, 1974. (A.79).

From January 1, 1974 through September 30, 1974 plaintiff owed defendant seven months' storage at $75.00 per month, a platform charge of $75.00, and an auctioneer's fee of $35.00, making a total of $635.00. (A.181).

On three occasions plaintiff advised defendant that she would pay her storage bill for release of the goods, and defendant brought her storage lots to the platform on a day and hour specified by her, and on none of those

occasions did she appear. This necessitated double labor for each occasion. (A.181).

Mrs. Jones agreed to defendants' charges and authorized removal of her belongings to storage. (A.182). As long as she was of the belief that the Department of Social Services would pay the storage charges, there was no dispute. After the Department notified her it would no longer pay the storage charges, plaintiff decided that the charges were unreasonable.

THE CONTESTED AND RELATED STATUTES

S 57-210 as pertinent provides:

"(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The ad-

vertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale."

Subsection (3), §7-210, provides:

"(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article."

Subsection (9), §7-210, provides:

"(9) The warehouseman is liable for damages caused by failing to comply with the requirements for sale under this section and in case of willful violation is liable for conversion."

42 U.S.C. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28. U.S.C. § 1343 provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . . . .

"(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . . . . "

POINT I

REQUISITE "STATE ACTION" IS ABSENT IN THE EXECUTION OF A WAREHOUSEMAN'S LIEN UNDER NEW YORK UNIFORM COMMERCIAL CODE §7-210

Although plaintiffs in the complaints assert a challenge to the constitutionality of §7-209, the statute imposing a warehouseman's lien, it appears that they have abandoned that claim. Plaintiffs' brief to this Court concerns itself solely with §7-210, the enforcement statute.

Three Federal district court cases have held that "state action" is not present in the sale of stored household goods by a warehouseman to satisfy his lien. Melara v. Kennedy, Civ. No. C-74-1535 (N.D. Cal. 1974), appeal docketed, No. 74-2 .. (9th Cir. 1974); Smith v. Bekins Moving and Storage Co., 384 F. Supp. 1261 (E.D. Pa. 1974); Brooks v. Flagg Brothers, Inc., Civ. No. 4050/73 (S.D. N.Y. July 7, 1975), appeal docketed, No. 75-7437 (July 24, 1975).

In Magro v. Lentini Brothers, 338 F. Supp. 464 (E.D. N.Y. 1971), affirmed per curiam on opinion below, 640 F.2d 1064 (2d Cir. 1971), cert. denied, 406 U.S. 961 (1972) the court intentionally by-passed ruling on the "state action" issue and held that §7-210 did not offend due process.*

* A New York State Supreme Court decision, Jones v. Banner Moving and Storage Co., 78 Misc. 2d 762 (Sup. Ct. Kings Co. 1974) which did not mention "state action" in holding the warehouseman's lien law unconstitutional was reversed, 48 A. D. 2d 928 (App. Div. 2d Dept. 1974) upon the ground that the lower court ruled prematurely on the constitutional issue.

A. A Preliminary Inquiry is the Nature of the Challenged Activity.

The thrust of plaintiffs' argument is that "state action" is present in the instant case because §7-210:

a. Grants the warehouseman a right to sell the deposited goods which he did have at common law.

b. Authorizes the warehouseman in foreclosing his lien by sale to perform a public function historically performed by the Sheriff.

The type of conduct required under the "state actic concept and the type of conduct required to satisfy the "under color of" element in 42 U.S.C. §1983 are equivalent. Monroe v. Pape, 365 U.S. 167 (1961); Shirley v. State Nat'l Bank, 493 F.2d 739 (2nd Cir.), cert. denied, 95 S.Ct. 65 (1974).

As a converse to "state action" being the touchstone of due process, "individual invasion of individual rights is not the subject matter of the (fourteenth) amendment." Civil Rights Cases, 109 U.S. 3, 11 (1883); Shelley v. Kraemer, 334 U.S. 1 (1948). "(T)he question whether particular discriminatory conduct is private, on the one hand, or amounts to state action, on the other hand, frequently admits of no easy answer." Moose Lodge 107 v. Irvis, 407 U.S. 163, 172 (1972). The admonition to resolve the question by "sifting facts and weighing circumstances" must be followed. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

A threshold inquiry in determining whether a challenged activity falls in the "state action" sector or in the private sector is whether the alleged deprivation involves

racial discrimination. Proof of the nexus between the complained of conduct linking it to "state action" is less onerous if racial discrimination is involved. Jackson v. Statler Foundation, 496 F.2d 312 (2d. Cir. 1974), cert. denied 420 U.S. 927, (1975); Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970).

In Weise v. Syracuse University, Docket No. 74-1977 (2d Cir. July 14, 1975) discrimination of a sexual nature was challenged. This Court, in reversing and remanding for a hearing a District Court finding of no "state action", stated at Slip Op. 4750:

> "In both Grafton v. Brooklyn Law School, supra, 478 F.2d 1137 at 1142, and Powe v. Miles, supra, 407 F. 73 at 81, we explicitly noted that our findings of no state action might be different if the cases involved discriminatory admission policies. Moreover, we have recognized the existence of a 'double standard' in state action---'one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims'...."

In Weise this Court ruled that sexual as well as racial discimination requires "less onerous" proof of "state action" to state a claim under the Civil Rights Act, since invidious discrimination of any sort is "within an area of recognized judicial competence...." Slip P. at 4752.

In Adams v. Southern Calif. First National Bank, 492 F.2d 324 (9th Cir. 1974), cert. denied, 95 S.Ct. 325 (1974) at page 333 the court stated:

> "And unlike racial discrimination cases in general, which have evidenced a pattern of

> intentional indirect circumvention of constitutional rights, these creditor remedies were based on economically reasoned grounds of very long standing, which appear to have been the topic of extensive reserach and legislative investigation."

Further justification for the "double standard" of proof is provided in Oller v. Bank of America, 341 F. Sup. 21, 23 (N.D. Cal. 1972), where the court, in finding a California auto repossession statute devoid of "state action", stated:

> "Reitman, which dealt with racial discrimination in violation of the due process clause, clearly presented a compelling factual siuation to which the Civil Rights Acts and their jurisdictional counterparts were designed to apply. The historical, legal and moral considerations fundamental to extending federal jurisdiction to meet racial injustices are simply not present in the instant case."*

Where, however, the alleged deprivation is one of economic due process, race relations not being involved, the state must take affirmative action to bring about the alleged deprivation, fairly compelling it as opposed to merely authorizing it or encouraging it. Moose Lodge No. 107 v. Irvis, supra. The state must all but order the proposed practice. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). In an economic due process framework, absent state compulsion and absent state officials acting in concert with defendants, plaintiffs cannot meet their burden of proof of establishing that defendants were "a willful

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* See also Burke and Reber, State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment (2 pts.), 47 S. Cal. L. Rev. 1, 52-53, 56 (1973), in which the authors justify the double standard of proof on grounds that, whereas race discrimination has no redeeming social value, the extrajudicial resolution of private disputes does have a valuable social end.

participant in joint activity with the state or its agents, ---." United States v. Price, 383 U.S. 794 (1966); Adickes v. Kress & Co., 398 U.S. 144, 152 (1970); Shirley v. Nat'l Bank, supra, Slip Op. at 1776.

Recognizing this onerous burden in a non-racial §1983 challenge, the Second Circuit asserted in Jobson v. Henne, 355 F.2d 129, 133 (1973):

> "This test (under color of) can rarely be satisfied in the case of anyone other than a state official."*

Accord, Oller v. Bank of America, supra, 342 F. Supp. at 23; Lucas v. Wisconsin Electric Power Co., 466 F.2d 636, 653 (7th Cir. en banc 1972), cert. denied, 409 U.S. 1114 (1973).

B. The Fact that the Warehouseman's Right of Sale is a Creature of Statute does not Transmute Liquidation by the Warehouseman of his Lien into "State Action".

The authorities on the common law of personal property are not in agreement that the right of sale to satisfy a warehouseman's lien did not exist at common law. Gilmore in his two-volume work, Security Interests in Personal Property (Little, Brown and Co., 1965) § 332, at 873-74, states that the lien for services, including the warehouseman's

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* Hence this Court held in Jobson that if common law tort immunity of state officials is to apply in Civil Rights lawsuits, the consequence would be the "judicial repeal" of the Civil Rights Act, state officials being shielded from liability and no other private persons eing liable under the Act.

The propriety of holding state officials to account under 42 U.S.C. 1983, the common law otherwise shielding them, at least partially, from personal liability for their wrongful conduct, is cited in Burke and Reber, supra, 47 S. Cal. L. Rev. at 53. Private persons such as warehousemen are subject to account for their activities in the form of exposure to liability in tort and contract. U.C.C. §7-210 (9); Weinstein v. Santini Transfer Co., 155 Misc. 139 (N.Y. City Court 1935). Liability under the Constitution is oppressive.

lien:

> "...in its origins was probably no more than a right to refuse to surrender the property until the debt was paid....In time, however, perhaps as a result of the accident of terminology, the right to sell the goods if the debt remained unpaid came to be thought of as going along with the original right of detainer and a true lien developed.
>
> "In the course of the Nineteenth Century many service liens of this type were created or reinforced by statute;....
>
> "Many of the statutes merely restated the common law lien in statute form; these statutes were originally designed, no doubt, to clarify the lienor's right to sell the property and to extend the lien to new types of servicemen who were not (or might have been held not to be) within the scope of the common law lien."

In 1879, the New York legislature passed "An act to enable storage warehousemen to collect their charges upon goods deposited with them by the sale thereof."* This enactment was superceded in 1897 by §80 of the Lien Law** giving creditors generally a lien against personal property to be satisfied by public sale. By Laws, 1907, c. 732, §33 a separate lien for warehousemen was pared away from Lien Law §80, reverting the statutory scheme to the situation prior to §80's passage. This became §118 of the General Business Law, the predecessor statute to §7-210, enacted in 1964.

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* Laws, 1879, c. 336, enacted May 19, 1979, in Conant, Ed., Stat. at Large of State of N.Y.; vol X at 709, 710.

** Laws 1897, c. 418, §80, in II N.Y. Gen Laws, pp. 2177-78.

Plaintiffs' contention that the enactment of the warehouseman's right of sale, affording him a right he did not possess at common law, constitutes the necessary state involvement to transmute a warehouseman's lien sale into "state action" does not withstand authority or analysis.

§7-210 re-codified the preexisting law which also permitted a lien sale. The §7-210 lien sale provisions could hardly have been considered new at the time of their adoption in New York. The fact that the law prevailing just prior to the U.C.C.'s adoption was embodied in a statute (§118 of the Gen. Bus. Law) rather than in the common law reinforces the conclusion that recofidification of the commercial law is not "state action".

Reitman v. Mulkey, 387 U.S. 369 (1967), upon which plaintiffs heavily rely, is clearly distinguishable because it involved racial discrimination and "because the proposition approved there had been initiated for the purpose of authorizing what had before been expressly prohibited." Adams v. Southern California First Nat'l Bank, supra 492 F.2d at 332. In contrast there was no prohibition at common law against a warehouseman's lien sale if the parties agreed to it.*

Neither Shirley nor Bond v. Dentzer, 494 F.2d 302, cert. denied, 59 S.Ct. 329 (1974) nor any other "state action" case has adopted plaintiff's statutory origin test as dispositive.

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* In fact, according to Gilmore, supra, §44.6 at 1238, "the sale of collateral (without a court order) is, always has been, and always will be the normal default proceedure."

The absence of "something new" in the benefit statutorily-conferred upon the repossessing car dealer in Shirley, and upon the wage-garnishing commercial lender in Bond, was but one of many factors weighed by the Second Circuit in each case. Far from proving plaintiffs' point, those prior Second Circuit decisions, in finding "state action" absent, are stronger authority for defendants' position that "state action" is absent in the auction sale of warehouse goods.

Shirley and Bond set forth nine factors other than the summary remedy's origin indicating lack of "state action". In Shirley the Second Circuit attached much weight to:

(1) The absence of intrusion by state officials actively participating in the challenged activity;

(2) The fact that the conditional sales contract signed by plaintiff provided for summary repossession;

(3) The fact that the challenged statute (Connecticut Retail Installment Sales Financing Act, authorizing summary repossession of consumer goods upon default) is consumer-protection oriented and, far from compelling seizure of defendant's car, actually discourages it;

(4) The minimal extent of the state's active involvement in codifying the pre-existing right of self-help repossession;

(5) The fact that, by hypothesis, "self-help" repossession is not a traditional state power being delegated to a private person.

In addition to these factors, the Bond v. Dentzer court also stresses:

(6) The absence of any economic state aid to the foreclosing finance company;

(7) The finance company's non-monopoly as a money lender;

(8) The fact that the wage assignment statutes under attack did not strip plaintiff of any debtor's rights he may have had prior to its passage;

(9) The weakness of plaintiff's case against the validity of the underlying debt and default.*

Defendants respectfully submit that all 9 factors are present in a warehouseman's lien sale requiring affirmance of the order of dismissal below for lack of "state action" on the precedents of Shirley and Bond.

(1) Absence of State Officials. No state officials participate in a warehouseman's lien sale. A lien sale is classified as a creditor "self-help" remedy. See Fuentes v. Shevin, 407 U.S. 67 at 80 n.12;

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* The court below relied on the five-factor test enunciated in Jackson v. The Statler Foundation, 496 F.2d 623 (2d. Cir. 1974), reconsideration en banc denied, id. at 636 and applied in Weise v. Syracuse Univ., supra. These five factors---degree of dependence upon governmental aid, the intrusiveness of the government's regulations, the extent to which regulation connotes government approval, the public function character of the organization's activity, and whether the organization can lay legitimate claim to recognition as private---are embraced by the factors set above. Since the Jackson-Weise test was developed in a factual context different from summary creditor remedies, defendants have followed the Shirley-Bond precedent.

Davis. v. Richmon., 512 F.2d 201, 201 n.3 (1st Cir. March 11, 1975); Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 930 (1st Cir. 1974); Burke and Reber, supra, 47 S. Cal. L. Rev. at 4, 53. As noted in Fletcher, supra:

> "In any event, whatever the truth of the old saw that possession is nine-tenths of the law, a creditor who holds something of value to his debtor is differently situated from one who does not: he does not need the state to facilitate his collection efforts."*

(2) Contract provides for Remedy. The "Bill of Lading and Freight Bills" given plaintiffs contain, at pars. 4(b)-(d) and 7 of the "Contract Terms and Conditions" on the reverse side, express authorization for the sale of their goods to satisfy charges. (A.17,131). The fact that

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* Besides the self-contradiction of equating the warehouseman's "self-help" remedy of lien sale with state action, there is an historical illogic in claiming that the fourteenth amendment was intended to do away with this device. At the time of the fourteenth amendment's adoption in 1870, the innkeeper's and other creditors' self-help remedy of distraint was well known. It can hardly be argued that the framers of the fourteenth amendment, and of the Civil Rights Act of 1871, intended simultaneously to wipe out self-help remedies. Anastasia v. The Cosmopolitan Nat'l Bank, 44 U.S.C.W. 2164 (7th Cir. Sept. 30, 1975); see generally Burke and Reber, supra, 46 S. Cal. L. Rev. 1003 et seq.

It is true that the scope of "due process" and "state action" has undergone considerable expansion in interpretating the fourteenth amendment's guaranties, but the course that constitutional law adjudication has taken could not have been known back in 1879 when the New York State legislators created the warehouseman's lien sale remedy. It cannot be said that the New York legislators held a "demonstrated intention" to impair as yet unforged due process rights of bailees of household goods. Shirley v. State Nat'l Bank, supra, Slip Op. at 1780. Reitman v. Mulkey's "state action" requirement of knowing legislative encouragement of private wrongs is absent in the instant case. Adams v. Southern California First Nat'l Bank, supra, 492 F.2d at 33.

plaintiffs did not sign the form is without significance, as a matter of contract law as well as under "state action" analysis. It is the substantive law of New York that upon receipt of goods in the course of his business, notwithstanding the absence of an express contract, an implied storage contract arises between warehouseman and depositor. Geo. B. Holman & Co. v. Graham, 165 Misc. 389 (Mun. Ct. N.Y. City 1937); 63 N.Y. Jur. "Warehouses and Warehousemen", §14, at 17-18 (1968). The general principle that a court of equity will imply a contract based upon the reasonable expectations of the parties as well as standard trade practices has been long-recognized in New York. Miller v. Schloss, 218 N.Y. 400, 407 (1916); 63 N.Y. Jur., supra, §15 at 20. In the instant case defendant warehouseman, aware of plaintiffs' evictions, would expect security in the form of a lien, and plaintiffs would have been agreeable as a condition of storage.

As the affidavit of Henry C. Brengel, Jr. (A.192-94) shows, it is the standard practice in the warehousing business for the warehouseman and depositor to enter into a storage contract and for the warehouseman to issue the depositor a warehouse receipt after deposit of his goods. The vast majority of warehousemen use printed forms of contracts and warehouse receipts which are similar or identical as to format and content. Representative

forms of storage contract and warehouse receipt are set forth at A.196-199. The customary provision for sale in satisfaction of the warehouseman's lien is set forth in "Terms and Conditions", A.197,199.*

(3) Statute is Consumer Oriented. §7-210 is rigorous in protecting the depositor's equity, providing for a minimum 26 days' advance notice of sale, a minimum 26-day redemption period, a comprehensive form of sales notice, and provisions as to the advertisement, place and manner of sale. See U.C.C. §7-210 Comment 1., subs. (6). The warehouseman is required to hold the balance of sales proceeds, less his charges and sales expenses, for delivery to the depositor, in effect rendering the warehouseman a fiduciary of the depositor. Milford Packing Co. v. Isaacs, 90 A.2d 796 (Del. Super. Ct. 1952). Failure to comply with these provisions, to the letter, mulcts the warehouseman in damages. U.C.C. §7-210, subs.

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* Due to the unclarity of the documents as reproduced in the Appendix these provisions are set forth hereinafter:

> Contract: "2. PAYMENT: Storage payments are due and payable monthly in advance.... The company has a lien on all goods moved or stored to secure payment for charges for all services rendered...."
>
> Warehouse Receipt: "2. PAYMENT (a): It is agreed that the company shall have a general lien upon any and all property deposited with it....All goods deposited upon which storage and all other charges are not paid when due will be sold at public auction to pay said accrued charges...."

(9); Grafstein v. A. Santini Storage Co., Inc., 26 N.Y.S.2d 125 (N.Y. City Ct. 1941), affd., 42 N.Y.S.2d 496 (App. Div. First Dept.) (sale on 14 days notice, rather than required 15 days, worked a conversion); King Transfer & Storage Co. v. Larson, 263 P.2d 164 (Okla. Sup. Ct. 1953) (failure to give notice for lack of address worked a conversion). Far from encouraging the warehouseman to exercise his right of sale conferred by the statute, §7-210 forces the warehouseman, if he is going to avail himself of the right of sale, to walk a tightrope. It is small "aid, comfort or incentive" to know, as stated in Hackett v. Nelson Express & Storage Co., 162 Misc. 444 (Sup. Ct. N.Y. Cty. 1937), that the warehouseman's lien sales law "seeks to protect the person storing the goods." Adickes v. Kress & Co., supra, 398 U.S. at 211-212 (separate opinion of Brennan, J.).

The warehouseman need not resort to "self-help" sale of the depositor's goods to collect his charges, as he can sue on the debt, 2 G. Gilmore, at 1201-02, or on a verified account stated, N.Y. C.P.L.R. Rule 3016(f). The absence of positive encouragement, much less compulsion, to collect storage charges by proceeding against the warehoused goods distinguishes the warehouseman's lien sale from Reitman v. Mulkey, supra, and Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970).

(4) Minimal State Involvement. The action of the state which plaintiffs seek to restrain, based upon

plaintiffs' theory of state action, is the enactment of the warehouseman's right of sale back in 1879. That enactment, in and of itself, did nothing to deny plaintiffs due process of law. It is the private act of the defendant warehousemen that allegedly deprives plaintiffs of their due process rights.* Had Flagg Brothers, Inc. not acted to sell plaintiffs' goods, the mere existence on the statute books of a right of sale enacted 95 years ago, the sum and total of the state's "beneficial" involvement in the sale, could not possibly give rise to a Federal cause of action under 42 U.S.C. §1983. The "significant", "affirmative", "active" state involvement in the deprivation of Federal constitutional rights necessary to sustain a §1983 action, is not only minimal, in the case of the warehouseman's lien sale, but, properly analyzed, no such "state action" can be found to exist. Langevin v. Chenango Court, Inc., 447 F.2d 296, 301 (2d Cir. 1971); Lucas v. Wisconsin Electric Power Co., supra, at 466 F.2d 647.

Thus in Chenango, this Court found "state action" missing despite a state of facts presenting a much stronger case for state action involvement than the

* In Evans v. Abney, 396 U.S. 435 (1970) the Supreme Court upheld Georgia trust statutes which gave effect to the trust settlor's racially discriminatory motivations, since the discrimination in devising land in trust to the city was the private settlor's, not the state's or city's.

instant appeal. The Court's holding there that "the Government did not itself increase the rents but simply allowed the landlord to institute an increase (without affording opportunity for a prior hearing)...", is dispositive.

> "What plaintiff really seeks is not an injunction against the state's action, but an affirmative command that it act more effectively. In essence, he contends that there is state inaction in the face of circumstances which are constitutionally intolerable. It is by no means clear that "state inaction" is equivalent to "state action" for Fourteenth Amendment purposes. Obviously, a state does not violate the Fourteenth Amendment by failing to enact into law the programs or policy judgments advocated by any particular citizen or group."

Lucas v. Wisconsin Electric Power Co., id.*

Nixon v. Condon, a racial discrimination case, was one of the first Supreme Court decisions culminating in Terry v. Adams, 345 U.S. 461 (1953), in which the Court struck down the denial of the right to vote by the device of the white primary. The "historical, legal and moral consideration", Oller v. Bank of America, supra, which prompted the Condon court to find "state

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* See also, for the view that to sustain a §1983 claim, the state must not just act, as by enacting legislation, but must act in some positive fashion that actually causes plaintiffs their injury, Shelley v. Kraemer, supra; Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); Weigand v. Afton View Apartments, 473 F.2d 545, 547 (3th Cir. 1973); Burke and Reber, supra, 47 S. Cal. L. Rev. at 16, 46, 54-55.

action" in a legislature grant of power to regulate primary election, distinguishes that case from the interests and concerns surrounding a warehouseman's lien sale. Only by lifting a passage out of context can that case be made applicable to this one.

More specifically, Nixon v. Condon stands for the narrow proposition that a private party engages in "state action" when the function of running an election is delegated to it by the state. This is a species of the public function theory that a private person engaging in an "act of public power", U.S. v. Wiseman, 445 F.2d 792, 796 (2d Cir. 1971), is subject to limitations upon that power the same as is the state in its performance of the act. Plaintiff's quotation from Nixon v. Condon* is a "make-weight" argument used to refute the dissent's argument that the state executive committee had inherent power to determine voting qualifications for primary elections.

If the Nixon v. Condon rationale is adopted here, as plaintiffs urge, it must be concluded that every right which a private person obtained by legislative action, as opposed to common law precedents, is subject to the Constitution. See Burke and Reber, supra (pt.1), 46 S. Cal. L. Rev. 1003, 1102-1109 (1973).

Another logical failing with plaintiff's statutory

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* "(I)f the state had not conferred it, there would be hardly color of right to give a basis for its exercise." Plaintiff's brief on appeal, at 22, 23.

origin theory is explained by Burke and Reber, supra, 47 S. Cal. L. Rev. at 47 (footnote omitted):

> "The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law upon private ordering, not the law's age or historical underpinnings. Unless the law in some fashion significantly interferes with private ordering, the challenged conduct should not be attributed to the state. To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct, pursuant to the identical state statutory or judicial law, would be state action in some cases while not in others depending solely upon the fortuitous and unimportant circumstance of the age and history of the law."*

In Davis v. Richmond, 512 F.2d 201, 203 (1st Cir. March 11, 1975) the First Circuit, rejecting the statutory origin theory in relation to the Massachusetts boardinghouse distraint lien conferred originally by statute, offered this analysis:

> "At common law an innkeeper could distrain his guests' belongings, but this right arose in the context of a legal relationship entailing special obligations and liabilities. A boardinghouse keeper apparently had no such specific legal right (although it is questionable how much light is shed on relations between a modern boardinghouse keeper and his tenants by reference to one aspect of the law in a society whose other aspects included debtors' prisons and, for most crimes, the gallows). In any event, we are disinclined

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* This rationale was adopted in Parks v. Ford's Speed Shop, 386 F. Supp. 1251 (E.D. Pa. 1974), aff'd on reconsideration, ___ F. Supp. ___, 44 U.S.L.W. 2075 (Aug. 7, 1975). See also Shirley v. State Nat'l Bank, Slip Op. at 1783, 1785 (Kaufman, C.J., dissenting).

> to decide the issue of state involvement on the basis of whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England. The statute at issue is a fairly unremarkable product of the continuing legislative function to define creditors' rights."

The statutory origin theory of "state action" has been rejected in a score of cases. Adams v. Southern California First Nat'l Bank, supra (statutory creation of foreclosing creditor's right to deficiency judgment held not "state action"); Phillips v. Money, 503 F.2d 990, 994 (7th Cir. 1974) (statutory creation of recorded lien for repair work on motor vehicles); Anastasia v. The Cosmopolitan Nat'l Bank, ___ F.2d ___, 44 U.S.L.W. 2164 (7th Cir. Sept. 30, 1975) (class of establishments that could invoke common law innkeeper's lien was expanded by statute); Turner v. Impala Motors, 503 F.2d 607, 611 and N.11, 612 (6th Cir. 1974) (adoption of U.C.C. §9-503 changed common law which allowed private repossession by agreement only); Davis v. Richmond, supra, (class of establishments that could invoke innkeeper's lien broadened to include boardinghouse); Melara v. Kennedy, supra (statutory creation of warehouse man's right of sale); Smith v. Bekins Moving and Storage Co., supra (same); Parks v. Ford's Speed Shop, supra (statutory right of sale to enforce repairman's lien); Krueger v. Wells Fargo Bank, 11 Cal.3d 352(1974) (statute allowed automatic bank set-off of claims).

Besides being illogical and devoid of precedent, plaintiffs' theory is wrong as applied. The "power" that is legislated to private persons so as to give rise, supposedly, to "state action" is illustrated in cases such as Wiseman and Perez v. Sugarman, 499 F.2d* 761 (2d Cir. 1974). The "power" treated in those cases is significantly different from the "right" of the warehouseman to sell warehoused goods to collect his charges. The latter is a mere "privilege", incidental to the private function of warehousing. The "power" to determine who shall vote, Nixon v. Condon; the power to fix seniority rights and work assignments, Steele v. Louisville & Nashville R.R., 313 U.S. 192 (1944); the power to seize people's personal effects, Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15 (1973); the power to discipline college students, Coleman v. Wagner College; or to compel appearance in court, United States v. Wiseman; are governmental in their impact on the person, calling for application of constitutional safeguards.* These powers are not comparable to the orderly sale of warehoused goods which is indistinguishable in appearance from any other private sale at auction.

In short, the compelling reasons for finding "state action" in the exercise of a "power", do not exist in the warehouseman's case. The "power-grant" cases are inapposite.

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* The aforementioned powers are among those "traditionally associated with sovereignty". Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 353.

(5) Traditional Public Function. The warehouseman, in exercising a right of sale of stored household goods which historically has always been, and can only be, exercised by the warehouseman himself,* is not engaged in a public function traditionally performed by the Sheriff. Smith v. Bekins Moving and Storage Co., supra.

Plaintiffs' reliance on Blye v. Globe-Wernicke Realty Co., supra, in support of the public function theory is misplaced. The factual differences between the Blye case and the instant case are apparent:

a. In Blye the belongings of a hotel occupant were summarily seized by an innkeeper under the provisions of the New York innkeeper's law (Lien Law §181); in the instant case the belongings were voluntarily delivered by the owners to the warehouseman.**

b. In Blye no action was undertaken by the innkeeper to improve or maintain the seized belongings; in the instant case the warehouseman has a duty to preserve the voluntarily delivered belongings. 63 N.Y. Jur., "Warehouses and Warehousemen", §15, §17 and cases cited.

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* See Merritt v. Peirano, 19 App. Div. 563 (Second Dept. 1896).

** The watchword of the Blye Court is "seizure". At 33 N.Y.2d 21, the court recognizes that the inherent vice in the innkeeper's lien is the fact that "the extraordinary remedy of summary seizure is especially harsh, oppressive and it would seem unnecessary."

c. In Blye the lien "involve(d) satisfaction of a debt having no particular relationship to the goods executed upon", Brooks v. Flagg Brothers, Inc., supra, Slip Op. at 6-7 (A.212-213); in the instant case the lien secures a debt for services rendered on the goods to be executed upon.*

In James v. Pinnix, 495 F.2d 206, 208 (1974) the Fifth Circuit in holding "state action" absent in the repossession of an automobile by a creditor cited these and other factors in distinguishing the rationale of Blye and other innkeeper's lien cases:

> "Such a taking closely resembles a seizure in satisfaction of a judgment---a function traditionally performed by a Sheriff or other state agent. In the present case, by contrast, the appellant creditor possessed and claimed no roving commission to extract

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* As the court below stated (A.213):

> "While such liens historically belong to the Sheriff for execution, execution on goods lawfully in a warehouseman's possession to satisfy charges arising out of such possession is not traditionally a function of the Sheriff; traditionally, the Sheriff was called upon for execution on goods only after the warehouseman had obtained a judgment lien."

** The Pinnix court had earlier found "state action" in Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), a case involving distraint of goods, relied upon by plaintiffs. The Fifth Circuit declined to extend the Hall doctrine to private repossession under §9-503 of the Uniform Commercial Code. In Hall the court found that entry into an apartment without notice and seizure of a tenant's property by a landlady possessed "characteristics of an act by the State".

> appellee's goods to satisfy a separate debt. Rather, he had a specific purchase money security interest in a particular item and he seized only that item. His action, moreover, was by long Mississippi tradition the sort of action performed by private persons, not state officials (citation omitted). Finally, seizure by entry into a dwelling in Hall, a major decisional factor because it was deemed indicium of state-like behaviour was absent from the instant case."

In Parks v. Ford's Speed Shop, supra, 1261 the court in reviewing landlord and innkeeper lien statutes concluded:

> "Even if the landlord and innkeeper decisions are correct within the limited context of their precise holdings, it is important to note that these cases have always presented unique factual situations which simply do not exist in cases that deal with other types of state statutes."

Plaintiffs' claim that warehousing of used household goods is a public function is unfounded in both fact and law. Sale of storaged household goods to satisfy charges has no equivalent in the public sphere. Under New York Law, the Sheriff does not and cannot seize and sell the debtor's household goods, as these articles are exempt from execution. N.Y. C.P.L.R. §5205 (a), (b).

Plaintiffs argue that a warehouseman performs a public duty in removing the goods of an evicted tenant from the sidewalk. This argument says nothing about the public nature of a subsequent sale of the goods to satisfy the warehouseman's charges. A further infirmity is that even if such a "duty" exists on the municipality's

part, the warehouseman has never been delegated that duty. Unlike the orphanage in Perez v. Sugarman, defendants here were not acting for the City of Mount Vernon in removing the plaintiffs' belongings. They were acting for the landlord as the landlord's subagent, the City Marshal being the agent for eviction of the tenants and their property pursuant to a warrant of dispossess. Ide v. Finn, 196 App. Div. 304 (1st Dept. 1921).

Further distinguishing this case from Perez, plaintiffs point to no statute or local law imposing a duty upon the State of New York or the City of Mount Vernon to keep the latter's sidewalks clear of temporary obstructions.*

Plaintiffs rely upon Annino v. City of Utica, 276 N.Y. 192 (1937), which says only that cities have a duty to keep public rights of way reasonably safe for travel. An unlighted tripod left in the street is a far cry from furniture stacked on the sidewalk which cannot reasonably be foreseen as a source of injury to a passerby. Plaintiffs' secondary authorities are more support for the view that the duty to keep sidewalks clear falls upon the adjoining landowner rather than the body politic. See 27 N.Y. Jur., "Highways, Streets and Bridges", §42; 3 Rasch, Landlord and Tenant, §1393 (2d Ed. 1971) at 220-221.

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* Mount Vernon has the express power to enact such laws for the management of its streets. N.Y. Const. art. 12, §3; N.Y. Mun. Home Rule Law, §11, subd. 1, para. a(6) (McKinney 1969).

(6) Absence of Economic Aid. The warehouseman receives no more economic aid from the state than any other private citizen.

(7) Non-Monopoly Status. The warehouseman does not enjoy a monopoly in the storage of household goods. Unlike the commercial lending activity considered in Bond, the household goods field does not require licensing by the state or municipal government. Any individual is free to enter the field at his will.

(8) No Reduction of Debtor's Rights. The legislative history of U.C.C. §7-210 in New York and the discussion of the present statute under factor numbered (3) above demonstrate that, far from depriving the depositor of any debtor's rights he may have had before its passage, the statute under attack actually operates to the depositor's benefit in comparison with pre-statute days.*

(9) Weakness of Debtor's Claim. As noted under factor numbered (2), in the usual warehousing situation, the depositor signs a storage contract setting forth the storage rate and accessorial service charges. The total charge is a matter of simple arithmetical computation (storage rate per month times months in storage). Unlike a mechanic's charges which are unilaterally

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* Whereas previously the warehouseman could have secured and collected a judgment for all charges due, now, by proceeding under the statute, he can only collect the proceeds of the auction sale. Any deficiency is the warehouseman's loss and cannot be recouped. 2 Gilmore, supra, §44.9.4.

devised after completion of the work, there can be no real dispute about the validity of the underlying storage debt.

In summary, the rationale of this Court in Shirley v. State Nat'l Bank and Bond v. Dentzer that state legislation which delimits the creditor class cannot be said to involve the state in benefitting and encouraging that class against the debtor class,* applies just as forcefully here. The State of New York is no more a "willful participant in joint activity" with the warehouseman today than it was 96 years ago when the lien sale remedy was created.**

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* Governmental action has been found lacking despite financial aid and administrative regulation so on-going and intrusive as, in one Supreme Court case, to constitute the private party a "public trustee" and the government its "overseer". C.B.S., Inc. v. Democratic Nat'l Committee, 412 U.S. 94, 116 (1973) (opinion of Burger, C.J.). Comparison of these cases to the unobtrusive, "good housekeeping" nature of the Uniform Commercial Code's warehousing provisions, cited by plaintiffs at page 31 of their brief, lends a fortiori support to defendants' contention that plaintiffs' burden of proving state action here is not met.

** Plaintiffs advance Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973) as an implicit holding that state action is present in the detention and sale of an automobile pursuant to the garageman's lien, N.Y. Lien Law, §184. Contrary to plaintiffs' assertions, the question of "state action" goes to the merits of a §1983 claim, not to the Court's jurisdiction to hear the claim under 28 U.S.C. §1343(3). The "state action" or "under color of re quirement of §1983 is one of the elements of recovery under that statute. Adickes v. S.H. Kress & Co., supra, 398 U.S. at 150. As long as plaintiffs' allegation that defendant acted "under color of" state law is not patently frivolous, the Federal courts acquire subject matter jurisdiction to look into the facts to see if the "under color of" requirement is met. Bell v. Hood, 327 U.S. 678 (1946). As explained by the Connecticut District Court in Kerrigan v. Boucher, 326

One may commiserate with warehouse depositors whose goods are sold to satisfy storage charges. "But private action, however hurtful," Krueger v. Wells Fargo Bank, supra, 521 P.2d 441, 452, "however discriminatory or wrongful," Shelley v. Kraemer, supra, 334 U.S. at 13, is not unconstitutional.

F. Supp. 647, 649, aff'd, 450 F.2d 487 (2d Cir. 1971):

> "Plaintiff's allegation that defendants' conduct violated his federal constitutional rights is enough to confer jurisdiction on this court. Whether his complaint states a claim under 42 U.S.C. §1983 upon which relief may be granted is not a question of jurisdiction....The viability of the claim stated can only be decided after the court has assumed jurisdiction." (Citations to Bell v. Hood, other cases, omitted.)

This Court in Lefcourt v. The Legal Aid Society, 445 F.2d 1150 (1971), affirmed dismissal of a §1983 claim on the merits for failure to state a claim, Federal subject matter jurisdiction being assumed since the alleged cause of action was one arising under the United States Constitution and laws. See also Gibbs v. Titelman, 502 F.2d 1107, 1115 (3d Cir. 1974); Adams v. Southern California First Nat'l Bank, supra, 492 F.2d at 338 (9th Cir.); Kirksey v. Thelig, 351 F. Supp. 727, 729 n.1 (D. Colo. 1972).

This Court's disposition of Hernandez without reference to "state action" or the "under color of" requirement is now clear. Since the District Court ruled on the constitutional merits, dismissing for failure to allege the deprivation of a Constitutional right, the other element of a §1983 recovery, Adickes v. S.H. Kress & Co., supra, all that this Court was required to determine on appeal was whether that element could be met were the facts alleged found to be true. There was no need to rule upon the "state action" element, subject matter jurisdiction having been satisfied by the pleadings, and no ruling on the "state action" merits have been rendered below.

Plaintiffs' citations to a Federal appellate court's duty to independently determine subject matter jurisdiction, therefore, are immaterial, since jurisdiction was present in Hernandez. Perez v. Sugarman can be harmonized with Bell v. Hood and the other cases cited above on the basis that where the "state action" element is found missing, on the facts, there is no 42 U.S.C. §1983 cause of action over which a Federal court could assert jurisdiction under that statute's jurisdictional counterpart, 28 U.S.C. §1343(3). See Shirley v. First Nat'l Bank, op. cit.

POINT II

U.C.C. §7-210 COMPORTS WITH THE REQUIREMENTS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

A. §7-210 does not Involve a Deprivation of Property in the Constitutional Sense, and Therefore the Procedural Safeguards and Judicial Controls against Unlawful Deprivations Mandated by Mitchell v. W.T. Grant Co. and Related Supreme Court Cases do not Apply in the Case of the Warehouseman's Lien.

In Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), the United States Supreme Court struck down a Wisconsin wage garnishment statute authorizing a prejudgment seizure of the debtor's earnings from the hands of his employer, without notice or prior hearing on the underlying debt. The Court's opinion concludes (footnote and citations omitted):

> "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process."

395 U.S. at 341-42. The idea of an involuntary seizure of private property and its critical consequences appear to be central to the Court's determination.

This decision spawned a host of legal challenges to summary creditor remedies, including a successful attack upon New York's replevin procedures which then authorized the plaintiff to seize the subject matter from the defendant's possession without notice or prior hearing. La Prease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970).

That court laid stress upon the absence of even a possibility for a hearing prior to seizure, for lack of advance notice to the party in possession. Again the element of outright seizure, through the office of the Sheriff, was central to that determination.

In 1972 the Supreme Court on the strength of Sniadach decided Fuentes v. Shevin, 407 U.S. 67, striking down Florida and Pennsylvania replevin statutes authorizing prejudgment seizure of chattels sold under conditional sales contracts upon which the vendee had defaulted. No notice or prior hearing was required: the repossessing party applied ex parte for a writ from the clerk of the court having jurisdiction, directing the Sheriff to seize the property from the defaulting vendee's possession. The fact of seizure as the key element triggering notice and prior hearing requirements is manifest throughout the Court's opinion.

The Supreme Court significantly narrowed its Fuentes holding in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), upholding Louisiana's sequestration statute authorizing a vendor's prejudgment seizure of chattels, without notice and prior hearing. Fuentes was distinguished on grounds that under the Louisiana scheme:

> "(T)he writ is obtainable on the creditor's ex parte application, without notice to the debtor or opportunity for a hearing, but the statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ issued,' Art. 3506, the existence of the debt, lien, and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees."

416 U.S. at 606 (footnote omitted). At another juncture the Court further distinguishes Fuentes upon the ground that:

> "(T)he Louisiana law provides for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking." (Emphasis added.)

416 U.S. at 616-617 (footnote omitted).*

The above quotations again illustrate the centrality of the "seizure" aspects of deprivations of property, seizure being equivalent to an involuntary taking from the owner's physical possession. In North Georgia Finishing, Inc. v. Di-Chem, Inc., ___ U.S. ___ , 42 L. Ed. 2d 451 (Jan. 22, 1975), Georgia's prejudgment garnishment statute was struck down, failing the Mitchell "judicial control" test in not requiring the creditor to establish a prima facie case before a judicial officer prior to seizure nor requiring a post-seizure hearing at which the creditor must prove the "existence of the debt, lien, and delinquency," or else suffer dissolution of the garnishment writ. Once again the element

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* Sugar v. Curtis Circulation Co., Civil No. 74-78 (S.D.N.Y. Oct. 17, 1974), is a good illustration of the Mitchell v. W.T. Grant Co. due process test. In Sugar the New York State prejudgment provisional remedy of attachment was found unconstitutional. The pertinent statutes, N.Y. C.P.L.R. 6201 et seq., now amended, permitted attachment of defendant's assets prior to commencing suit, upon plaintiff's ex parte application, without providing for a post-seizure hearing "at which the creditor-plaintiff must prove the grounds 'upon which the writ issued.'" This case is clearly distinguishable from warehouseman's lien practices since it involved wresting from the debtor-defendant the use and control of his property.

of an involuntary deprivation of use and control of property was central to the Court's determination.*

Defendants respectfully submit that the warehouseman's right of sale under §7-210 does not involve a deprivation of property in the constitutional sense and, therefore, the judicial safeguards required by due process to prevent unwarranted deprivations do not apply. See Phillips v. Money, 503 F.2d 990 (7th Cir. 1974); IDS Leasing Corp. v. Hansa Jet Corp., ___ Misc.2d ___, N.Y.L.J. March 28, 1975 (N.Y.Sup.Ct. Westchester Cty.) at 18, col.2.**

No summary seizure is involved in the case of a warehouseman's lien. The depositor requests the warehouseman

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* Quoting from 43 U.S.L.W. 4193:

> "That the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause. 'The Fourteenth Amendment draws no bright lines around three-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.' 407 U.S. at 86. Although the length of severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort. Because the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment.
>
> "The Georgia statute is vulnerable for the same reasons."

** The Seventh Circuit's rationale in Phillips upholding constitutionality of the Indiana repairman's lien law on grounds that the party out of possession, who seeks to alter the status quo, has the burden of initiating court action, is applicable in the instant case.

to pick up the goods for removal to storage. At that point the depositor signs a contract containing the terms and conditions of storage, including rates, charges and right of sale upon default. (A.191-199). This document seals an arrangement voluntarily and knowingly entered into with rights and obligations on both sides.*

At the point of sale the warehouseman already has possession of the debtor's property. There can be no deprivation in the sense of a physical taking or seizure as was considered by the Supreme Court in Sniadach, Fuentes, Mitchell v. Grant and Di-Chem.** Therefore, the protection of "judicial control" called for in Mitchell is not required in the case of warehouseman's lien enforcement, as the deprivation requiring such control does not occur.

The sale of the depositor's goods is a deprivation, but it (1) does not involve a seizure, (2) is agreed to by the debtor at the outset of the transaction,*** and (3) can be

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* It is defendants' contention that such an agreement was reached between them and plaintiffs at the outset of the storage transaction. Plaintiffs' claim of defendants' changing rates and terms (A.134-136) is refuted by the "Bill of Lading" given to plaintiffs---plaintiff BROOKS' by personal in-hand delivery---showing the exact removal charges and storage rates. (A.16, 189).

** See also Arnett v. Kennedy, 416 U.S. 134, 171 (White, J., concurring); Blye v. Globe-Wernicke Realty Co., Inc., 33 N.Y.2d 15 (1973); Note, Future of Creditors' Remedies in New York: The Impact of Fuentes and Blye, 38 Albany L. Rev. 467, 471-472 (1973-74).

*** See D.H. Overmyer v. Frick Co., 405 U.S. 174 (1972); cf. Fuentes v. Shevin, 407 U.S. at 97, 102 (White, J. dissenting); Anderson, A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractural Waiver, 79 Case and Comment No. 1 (Jan.-Feb. 1974), p. 24.

characterized as a "de minimis" type of deprivation. Any depositor who allows belongings to remain in permanent storage long enough for arrearage to accrue and the lot to be sold can not be in vital need of those goods. Cf. Sniadach v. Family Finance Corp., supra.

In Magro v. Lentini Bros. Moving and Storage Co., supra, 338 F. Supp. 464, aff'd, 400 F.2d 1064, cert. denied, 406 U.S. 961, it was held that the warehouseman's lien sale pursuant to U.C.C. §7-210 does not violate constitutional due process. There the plaintiff's household goods had been sold at auction after default in storage charges without prior court hearing to ascertain the existence of the debt. The court ruled due process was not violated because (quoting from 338 F. Supp. 467):

> "First, the property here involved has been voluntarily and knowingly delivered to the party seeking to execute on it. Second, the statute in question here specifically provides for notice, and the bailor may enter the Court to obtain redress after receipt of that notice. Third, the deprivation of property which has been voluntarily parted with for long periods of time cannot be held to have the same disastrous effect as those specialized type(s) of property referred to by the Court in Sniadach."

Thus, even if the "necessities of life" rationale in Sniadach has been vitiated by Fuentes, Magro is still good precedent because it rests upon two separate lines of reasoning---the absence of a "seizure" and the satisfaction of constitutional notice requirements affording the depositor an opportunity to initiate judicial proceedings prior to sale. Secondly, two weeks after certiorari was denied in Magro, on May 30, 1972, the Supreme Court handed down Fuentes.

It is inexplicable why, if Fuentes was designed to change the outcome in Magro, certiorari in Magro was denied. Thirdly, Fuentes suggests that there may come a point when property interests become so minimal as no longer to be worthy of constitutional protection. 407 U.S. at 90 n.21. As Magro acknowledges, that point is reached when property "is voluntarily parted with for long periods of time," as in the case of warehoused goods indicating scant interest in their continuing use and possession on the owner's part.

B. Balancing the Interests of Depositor and Warehouseman Compels the Conclusion that U.C.C. §7-210 Satisfies the Due Process Clause.

The procedure mandated by §7-210 "effects a constitutional accommodation of the conflicting interests of the parties." Mitchell v. W.T. Grant Co., Slip Op. at 7.

Perhaps the most widely-quoted statement of what "due process" means, for analytical purposes, is Mr. Justice Frankfurter's opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163, 95 L. Ed. 817, 849:

> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished---these are some of the considerations that must enter into the judicial judgment."

The need for a fluid due process analysis balancing the interests of both sides has been restated many

times,* and it is clear from Mitchell that the same test is to be applied to an economic due process setting.

Turning first to the interest of the depositor in a warehouseman's lien sale, it is clear that the depositor suffers the loss of ownership and right to have the goods ultimately restored to his possession. See U.C.C. §7-210 (5). The depositor does not, however, suffer the deprivation of an immediate possessory interest. Unlike the distraint of goods pursuant to an innkeeper's lien, actual physical possession is not wrested away from the depositor by a lien sale. And unlike the continuing detention of goods, pursuant to the garageman's lien considered in Hernandez, a warehouseman's lien sale does not affect any interest in the immediate return and use of the goods. In short, the warehouseman's lien sale, properly analyzed, works to deprive the depositor of his ownership interest in the return of the goods.

The severity of this deprivation must be evaluated in light of other types of deprivations which are decreed not severe enough to justify a hearing prior to deprivation, such as loss of employment, even where state unemployment compensation is not available, Arnett v. Kennedy, 416 U.S. 134 (1974); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); and loss of social security benefits, Frost v. Weinberger, supra. This deprivation is legitimately entitled to recognition only when the depositor will be unable, at some future date when he will need them, to replace the goods.

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* See Frost v. Weinberger, 515 F.2d 57, 66 (2d Cir. April 17) 1975).

Against these interests must be measured the warehouseman's interests in collecting his charges and minimizing collection costs, Mitchell v. W.T. Grant Co., supra; the worth of requiring a pre-sale hearing or other judicial control in light of the simple issues and small possibility of warehouseman's error, Lucas v. Western Electric Power Co., supra; Note, 38 Albany L. Rev., supra, at 484; depositor's access to judicial relief both before and after a sale,* Lindsey v. Normet, 405 U.S. 56 (1972); the marginal benefit to the depositor of the procedure advocated; and finally, the public interest in facilitating creditor recovery, North Georgia Finishing, Inc. v. Di-Chem, Inc., supra (Powell, J., concurring); Magro v. Lentini Brothers, supra, 338 F. Supp. at 468; Burke and Reber, supra, S. Cal. L. Rev. at 52-53, 56. Defendants submit that on balance the warehouseman's interests in "self-help" by lien sale override the depositor's interests and accordingly the lien sale is not fundamentally unfair nor a denial of due process of law.

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* Unlike the Illinois hotelkeeper's lien law and other creditor self-help statutes, which sweep away any right of recourse by the debtor, U.C.C. §7-210 preserves to a depositor his full panoply of legal remedies against a precipitate or improperly conducted sale. Contrast Anastasia v. The Cosmopolitan Nat'l Bank, supra; Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Cal. 1972); Klim v. Jones, 315 F. Supp. 109, 110-111 n.1 (N.D. Cal. 1970) (California Innkeeper's Lien Law); Burke and Reber, supra, 47 S. Cal. L. Rev. 1, 51 (1973).

If the depositor is of limited income, as in the case of the two individual plaintiffs, he can apply for "poor person" relief, pursuant to 28 U.S.C. §1115, if suing in the Federal Court, Straley v. Gassaway Motor Corp., 359 F. Supp. 902 (S.D. W.Va. 1973); or, if suing in New York State Court, he can seek to have the costs and expenses necessary to prosecute the action waived under N.Y. C.P.L.R. §1101.

POINT III

NEITHER PLAINTIFFS NOR DEFENDANTS ARE PROPER REPRESENTATIVES OF THEIR PURPORTED CLASSES

A. Plaintiff Class.*

Fed. R. Civ. P. 23(a) (3) requires, in order to certify a plaintiff class as properly designated, typicality between the claims of the named plaintiffs and those of the class members. This is construed to mean that the interests of those represented must be "of the same class", that is, co-extensive, with the interests of the named plaintiffs. Hansberry v. Lee, 311 U.S. 32 (1910); 3B Moore, Federal Practice, "Class Actions" §23.02, §23.06-2 (2d Ed. 1974) at 74, 325.

Where the class members and the named plaintiffs have different or conflicting interests in the outcome of the litigation, their respective claims do not coincide and, therefore, both the typicality requirement of Rule 23(a) (3) and Rule 23(a) (4), requiring named class representatives who "will fairly and adequately protect the interests of the class," are not met. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968) (Eisen II); Richland v. Cheatham, 272 F. Supp. 148, 155 (S.D. N.Y. 1967); William Goldman Theatres, Inc. v. Paramount Film Dist. Corp., 49 F.R.D. 35, 40-41 (E.D. Pa. 1969).

* Although the parties agreed to stipulate at the outset of the action to the propriety of the plaintiff and defendant class, then District Judge Gurfein did not approve the plaintiff class or defendant class stipulations which were submitted to him on February 25, 1974. The stipulations were not presented to Judge Werker to whom the case was assigned after Judge Gurfein's elevation to the Second Circuit Court.

Plaintiffs purport to represent "persons whose property is stored in a warehouse located in the State of New York and whose property...(is) subject to sale without opportunity for a prior hearing." (A.6,76). Not all defaulting depositors, however, want the warehouseman to provide them with a hearing with its attendant costs that will have to be born out of the sales proceeds. U.C.C. §7-209 (1). Ihrke v. Northern States Power Co., 459 F.2d 566, 572 (8th Cir. 1972), vacated as moot, 409 U.S. 85 (1972); Danner v. Phillips Petroleum Co., 447 F.2d 159, 163 n.9 (5th Cir. 1971).

Plaintiffs' interests are clearly antagonistic to the interests of depositors who deliberately allow storage charges to accrue so that unwanted furniture can be sold and any sales proceeds remitted to them, after deduction of charges and costs of sale.

This is just the tip of an iceberg of conflicting claims and interests. There are depositors who have little concern if their goods are sold since the goods are encumbered with security interests and are therefore already subject to repossession and sale. There are other depositors who do not care to be sued and whose only interest in a hearing is a post-sale action for damages for improperly following §7-210's procedures. These depositors' interests in the constitutionality of §7-210 are directly opposed to plaintiffs' interests. Plaintiffs cannot properly represent them.

Plaintiffs' indigency distinguishes their claims from any

depositor class not entirely composed of indigents. Lucas v. Wisconsin Electric Power Co., F.2d 638, 645 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973). Plaintiffs' indigency allows them to make claims to special treatment that cannot be advocated on behalf of most members of the purported class who can afford to initiate legal action and buy replacement furniture.*

The factual situation underlying the instant case represents a minuscule segment of the warehouse depositor class. (A.160,166-67, Affidavit of Donald E. Horton in opposition to motion for summary judgment). Plaintiffs are representative only of warehouse depositors of household goods who have been evicted from their dwellings and who, under emergency conditions which do not permit preparation or execution of the usual documents in a storage transaction, obtain the services of a warehouseman.

The plaintiff class is drawn too broadly, including depositors who have not suffered actual deprivation but have only been threatened with the sale of their goods pursuant to §7-210. Inclusion of these class members is improper, not only because it renders the class impossible to ascertain, DeBremacker v. Short, 433 F.2d 733 (5th Cir. 1970), 3B Moore, supra, but, more fundamentally, the class includes plaintiffs who lack the necessary standing to belong in the

* In Santiago v. McElroy, 319 F. Supp. 284, 290 (E.D. Pa. 1970), the plaintiff class was narrowed to plaintiffs too poor to bring an action staying the sale of personal property pursuant to a landlord's lien, since none of the facts presented in support of the unconstitutionality claim were shown to obtain for moderate and high-income tenants.

class, Roe v. Wade, 410 U.S. 113, 123, 128 (1973); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Boone v. Wyman, 195 F. Supp. 1143 (S.D. N.Y. 1969).

B. Defendant Class.

Rule 23(b)(2) requires that the parties opposing the class have acted on grounds generally applicable to the class. Vulcan Society v. Civil Service Com'n, 490 F.2d 387 (2d Cir. 1973). If the parties in opposition are themselves a class, this requirement cannot be met, at least in the case of "all warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to...§209-210." (A.7,77). Some warehousemen who impose liens and subject goods to sale are commercial warehousemen who follow an informal procedure significantly different from household goods warehousemen. Comp. U.C.C. §7-210, subs. 1 with U.C.C. §7-210, subs. 2.* Grounds giving rise to a constitutional challenge to the procedure under subsection (1) do not apply to the more detailed procedure under subsection (2).

Secondly, the constitutional grounds justifying emergency summary sales do not apply to the transactions between the named parties, rendering the named defendant warehouse an impermissable spokesman for warehouses conducting such sales. See North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

* Subdivision 1 does not require advertisement of the sale, does not set a minimum time period between the notice of sale and the sale itself, and exonerates the warehouseman from all liability under tort or contract for a wrongful sale provided he has "sold in a commercially reasonable manner." See U.C.C. §7-210, comment 1.

The differences in the warehousing of household goods alone (as distinguished from commercial warehousing) makes defendant FLAGG BROTHERS, INC. an improper representative of all warehousemen in the State. Household goods warehousing encompasses not only conventional household furnishings but also office establishments, stores, museums, hospitals, works of art, and electronic machines. See N.Y. C.R.R. 800.1(2). Depending on the type of "household goods" stored, warehousemen in New York deal with goods of wide ranging value stored by diverse depositors. Grounds for the sale of one depositor's goods would be inapplicable for another depositor.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated: December 12, 1975
New York, New York

Respectfully submitted,

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APPENDIX

to

Brief of Defendants on Appeal

Federal Court Cases Under the Civil Rights Statutes
Upholding Summary Creditor Self-Help Pemedi s
For Lack of State Action

By Circuit

First Circuit

Davis v. Richmond 512 F.2d 210 (March 11, 1975)	Distraint of Property under Boardinghouse Lien
Fletcher v. Rhode Island Hosp. Trust Nat'l Bank 496 F.2d 927 cert. denied, ___ U.S. ___, 42 L. Ed.2d 277 (1974)	Bank Set-Off

Second Circuit

Bond v. Dentzer 494 F.2d 302 (1974)	Garnishment under Wage Assignment
Brooks v. Flagg Brothers, Inc. Civ. No. 4050/75 HFW (July 7, 1975) appeal docketed, No. 75-7437	Warehouseman's Lien Sale
Kerrigan v. Boucher 326 F. Supp. 647 (D. Conn.) aff'd, 450 F.2d 487 (1971)	Innkeeper's Lien
Shirley v. State Nat'l Bank 493 F.2d 739 cert. denied, ___ U.S. ___, 42 L. Ed.2d 284 (1974)	Repossession under Connecticut Installment Sales Financing Act

Third Circuit

Gibbs v. Titelman 502 F.2d 1107 (1974)	Peaceful Repossession under U.C.C. §9-503; Sale of Collateral under U.C.C. §9-504; Pennsylvania Motor Vehicle Sales Financing Act
Jackson v. Metropolitan Edison Co. 483 F.2d 754 (1973) aff'd, 419 U.S. 345, 42 L. Ed.2d 477 (1974)	Utility Service Cut-Off
Parks v. Ford's Speed Shop 386 F. Supp 1251 (Ed. Pa. 1974) aff'd on rehearing, 44 U.S.L.W. 2094 (July 28, 1975)	Repairman's Lien
Smith v. Bekins Moving & Storage Co. 384 F. Supp 1261 (E.D. Pa. 1974)	Warehouseman's Lien Sale

Fourth Circuit

Fifth Circuit

James v. Pinnix 495 F.2d 206 (1974) distinguishing Hall v. Garson 430 F.2d 430 (5th Cir. 1970)	Peaceful Repossession under U.C.C. §9-503

Sixth Circuit

Turner v. Impala Motors 503 F.2d 607 (1974) modifying Palmer v. Columbus Gas of Ohio, Inc. 479 F.2d 153 (1973)	Peaceful Repossession under U.C.C. §9-503

Ninth Circuit
(continued)

Melara v. Kennedy No. C-74-1535 ACW (N.D. Cal.) appeal docketed, No. 74-2831 (1974)	Warehouseman's Lien Sale
Oller v. Bank of America 342 F. Supp. 21 (N.D. Cal. 1972)	Peaceful Repossession and Sale of Collateral under U.C.C. §9-503, §9-504; California Automobile Sales Financing Act

Tenth Circuit

Kirksey v. Thelig 351 F. Supp. 727 (D. Colo. 1972)	Peaceful Repossession under U.C.C. §9-503

District of Columbia Circuit

COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHIRLEY HERRIOT BROOKS, etal.,

Plaintiffs-Appellants,

- against -

FLAGG BROTHERS, INC., etal.,

Defendants-Appellees

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 15th *day of* Dec *19* 75 *at*

1) Jaffee Shaw & Rosenberg
51 Madison Ave, N.Y., N.Y.
2) Louis J. Lefkowitz
2 World Trade Center, N.Y., N.Y.
3) Weiss & Weiss
2 West 45th St., N.Y., N.Y.

upon

deponent served the annexed Brief

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person served to be the person mentioned and described in said papers as the* attorneys *herein.*

Sworn to before me, this 15th *day of* December *19* 75

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHIRLEY HERRIOT BROOKS, etal.,

Plaintiffs-Appellants

- against -

FLAGG BROS., INC., etal.,

Defendants-Appellees

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the ~~XXXX~~ 15 *day of* December *19* 75 *, deponent served the annexed* Brief

upon The Legal Aid Society of Westchester Co. *attorney(s) for*

in this action, at 56 Grand Street, White Plains, N.Y.

the address designated by said attorney(s) for that purpose by depositing ~~a~~ es *true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 15th
day of December *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS